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Supreme Court, U.S.
FILED

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No. _____

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SPYRIDON ARMENIS,
Petitioner,

v.

CESAR V. AGUIRRE; ANASTASIOS ANDRIOPOULOS; CHARLES E. BENDER; B.W. COVINGTON; CHRIS DALAMANGAS; P. DELAPORTAS; GEORGE IOANNIDES; KYRIAKOS IOANNIDES; V. KALTSAS; CHRISTOS P. KARTSONIS; DEMETRIOUS KARSTONIS; A. GEORGE MAGOULIOTIS; A. PAPATHANASOPOLOUS; STEVE POULOS; S.L. PRABHU; INDUMATHI PONNAPALLI, as personal representative of the estate of Ponnapalli Ramakrishna; NEAL ROTH; DOROTHY ROYCHOUDHURY; S.L. STOGIANNIS; G. VALLIANOS,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

SPYRIDON ARMENIS, *Pro se*
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39 pp

QUESTIONS PRESENTED

The following questions are presented by the Petitioner:

1. Are fraud upon the court and legal malpractice the same cause of action?

2. Was the lower court authorized to dismiss Petitioner's appeal as having been filed too late?

3. May a lower court base its ruling upon incomplete records?

4. Was Petitioner properly subject to arbitration?

PARTIES BELOW

Petitioner Spyridon Armenis was the third party defendant-appellant in the court below. Respondents Cesar V. Aguirre, Anastasios Andriopoulos, Charles E. Bender, B.W. Covington, Chris Dalamangas, P. Delaportas, George Ioannides, Kyriakos Ioannides, V. Kaltsas, Christos P. Kartsonis, Demetrious Karstonis, A. George Magouliotis, A. Papathanasopolous, Steve Poulos, S.L. Prabhu, Indumathi Ponnapalli, as personal representative of the estate of Ponnapalli Ramakrishna, Neal Roth, Dorothy Roychoudhury, S.L. Stogiannis, G. Vallianos, were the plaintiffs-appellees in the court below.

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Spyridon Armenis, on behalf of himself, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, filed on March 18, 1998, denying petitioner's petition for rehearing by the panel that rendered the decision and petitioner's suggestion for rehearing en banc.

OPINIONS BELOW

The Court of Appeals' denial of petition for rehearing and suggestion for rehearing en banc is reproduced on pages la-2a of the Appendix to this certiorari petition (hereafter "Pet. App."). The Court of Appeals' Order and Judgment is reproduced at Pet. App. 3a-6a. The unreported District Court Order of July 2, 1997 is reproduced at Pet. App. 7a-9a. The unreported District Court Judgment of September 26, 1996 is reproduced at Pet. App. 10a-12a. The unreported District Court Order of September 25, 1996 is reproduced at Pet. App. 13a-18a.

JURISDICTIONAL STATEMENT

The Court of Appeals' final judgment was entered on March 18, 1998. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

This case invólves Federal Rule of Civil Procedure 60(b).

Federal Rule of Civil Procedure 60(b) provides:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a

party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

Petitioner is a pro se litigant abandoned by his lawyer at an arbitration hearing. The Petitioner was not subject to the

arbitration agreement. The abandonment of her client by Petitioner's attorney consisted of her not showing up for the arbitration hearing *at all.*

An arbitrator ordered Petitioner to pay actual and punitive damages totaling $4,524,305.00 to the Respondents. The Respondents are 20 joint venturers with ARW Exploration Corporation (hereinafter, ARW), whose President was Petitioner.

The Respondents had filed their claims against Petitioner in the District Court. The District Court ordered the Respondents to refile their claims and bring them before an arbitrator. (ARW, in five of the six joint venture contracts, had submitted to arbitration under AAA rules.) At the arbitration hearing, ARW's/Petitioner's attorney, Karen Howick, did not appear. Thus, the arbitrator issued summary judgment against ARW *and Petitioner individually.* Petitioner was mortified to learn that his attorney had failed to appear on such a critical issue and dismissed her. The District Court took insufficient measures and did not observe procedural safeguards to protect Petitioner's individual rights subsequent to this legal disaster.

On questions of fact, the District Court subjected Petitioner *individually* to arbitration ("chaining his fate" to the fate of ARW). The District Court's leading arguments were fourfold: (1) Petitioner had "undercapitalized" ARW; (2) Petitioner permitted the corporate charter of ARW to expire; (3) Petitioner commingled funds of ARW with his personal monies; and (4) Petitioner acted in the manner of a stock brokerage agent.

The District Court ruled against Petitioner on these issues in the form of a summary judgment.

According to the District Court docket sheet in the Court of Appeals' files, the court files consist of documents numbers 101, 126, 127, 154, 156, 157, 158, 159, 160, 161,

174, 178, and 179. The other documents mentioned in the docket sheet apparently are not in the court file.

The District Court recited precedents to the effect that arbitration does not apply *individually* to the officer of a corporation for which he signed an arbitration clause. Pet. App. 16a. Next, the District Court deviated from exactly these precedents that it had cited. Pet. App. 16a-17a.

The Tenth Circuit Court of Appeals then made a cursory, unpublished affirmation of the District Court's decision, equating "fraud upon the court" with "legal malpractice." Pet. App. 5a.

REASONS FOR GRANTING THE WRIT

The Writ must be granted because the Tenth Circuit's confusion of fraud upon the court with legal malpractice in federal court is a far more serious issue than that of merely allowing an attorney "off the hook" because she made a *deliberate* choice to "sell out" her client by her non-appearance.

Such behavior on the part of *anyone*, let alone an officer of the court, in deliberately sabotaging a case is a *felony*:

> 18 U.S.C. § 1503. Whoever . . . corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b).

See also 18 U.S.C. § 1505.

See e.g., *United States v. London*, 714 F.2d 1558 (11th Cir. 1983)(violation of above statutes found in civil case).

The courts have a *duty* to protect the public from unethical attorneys. See *Jacobs v. State Bar*, 136 Cal.Reptr. 920, vacated 570 P.2d 1230 (Cal.App. 1977); *The Florida Bar v.*

Moses, 380 So.2d 412, 417 (Fla. 1980).

I. FRAUD UPON THE COURT AND LEGAL MALPRACTICE ARE NOT THE SAME CAUSE OF ACTION.

Rule 60(b) is to be given a liberal construction so as to do substantial justice and "'to prevent the judgment from becoming a vehicle of injustice.'" *MIF Realty L.P. v. Rochester Associates*, 92 F.3d 752, 755 (8th Cir. 1996)(citation omitted).

Which is exactly what the confusion in overlapping legal malpractice with fraud upon the court issues have become, a vehicle of injustice.

> The legal malpractice system . . . does a very poor job of compensating malpractice victims.
>
> *Developments In The Law -- Lawyers' Responsibilities And Lawyers Responses*, 107 Harvard L. Rev. 1547, 1574 (1994).

Only *this* Court can reverse that trend.

The lower court relied on its own precedent in *MacCuish v. United States*, 844 F.2d 733, 735-36 (10th Cir. 1988), addressing the situation as "allegations of the incompetence of his attorney."

Petitioner did not raise the issue of incompetence, he raised the issue of *deliberate betrayal*.

Incompetence means lack of ability, knowledge, legal qualification, or fitness to discharge the required duty or professional obligation. *Black's Law Dictionary*, 6th edition, page 765.

To betray is the act of delivering up to an enemy

something of value. *Black's Law Dictionary*, 6th edition, page 161.

This type of misuse of the English language was noted in a satire on the English legal system over a century ago:

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean--neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master--that's all."
>
> *The Annotated Alice: Alice's Adventures In Wonderland & Through The Looking Glass* by Lewis Carroll 269 (Martin Gardner 1960).

Alice-in-Wonderland was a world in which words had no meaning. *Welch v. United States*, 90 S.Ct. 1792, 1803 (1970).

An older reference to the corruption of words was noted in the *Koran*:

> A corrupt word is like a corrupt tree which has been torn off the ground, and has no fixity.
>
> *Koran* 14:26

Betrayal by lawyers has been noted in literature throughout history from ancient times to this century:

> Woe unto you, lawyers! for ye have taken away the key

of knowledge: ye entered not in yourselves, and them that were entering in ye hindered.

Luke 11: 52

I would be loath to speak ill of any person who I do not know deserves it, but I am afraid he is an attorney.

Samuel Johnson

A lawyer with his briefcase can steal more than a hundred men with guns.

Mario Puzo in *The Godfather.*

There are two ways to adjudicate a case:

Let justice be done though the heavens fall.

Lord Mansfield in *Rex v. Wilkes,* 4 Burrow's Reports 2527, 2562 (1768).

Or :

It is not the technical legal conception that leads to the decisions pronounced by the judge, but it is the decision which the judge intends to pronounce which lead him to the finding of the technical reasons therefor--the decisions themselves being the result of the judge's views on the social and economic questions involved in the solution of the apparently abstract constitutional problems.

Louis B. Boudin, *Government by Judiciary,* Volume I,

page 338 (1932).

The last paragraph of the deciding panel's decision appears to indicate the latter approach, though it is doubtful whether Article III federal judges actually authored the opinion. As testimony at public hearings before the Commission on Structural Alternatives for the Federal Courts of Appeals has repeatedly borne out, *most* of the work in the federal appeals courts is now done by staff attorneys.

The sloppy use of citations in order to reach a predetermined result (staff attorneys would naturally be far more reluctant to point out the error of his ways to a lower court judge than actual Article III judges would) indicates that the decision in the lower court was in fact authored by staff attorneys. Petitioner alluded to this issue in his Motion For Panel Rehearing and Suggestions For Rehearing En Banc, page 5, paragraph 10(a).

> The district court and the panel of this appeals court were unwilling to acknowledge the facts submitted by [Petitioner] Armenis relating to his former counsel's fraud upon the court under FRCP 60 (as opposed to FRCP 59). To appellant's lay opinion, the courts were unwilling to hold against a colleague attorney.

A review of the cases cited in the Order of February 19, 1998, Pet. App., 5a, indicates that (a) staff attorneys actually did the work or (b) the deciding panel simply wasn't paying attention, to wit:

Anderson v. Department of Health & Human Services, 907 F.2d 936, 952 (10th Cir. 1990) addressed *inconsistent testimony*.

MacCuish v. United States, 844 F.2d 733, 735-36 (10th Cir. 1988) addressed *ineffective assistance* of counsel, not a

lawyer who deliberately sabotaged her own client by refusing to show up at the most critical stage of the proceedings. MacCuish's attorney had failed to accept a $50,000 settlement offer in a case he later lost at trial. MacCuish's attorney, at least, showed up.

DeVargas v Montoya, 796 F.2d 1245, 1258 (10th Cir. 1986) addressed the actions of the *defendant*, Clyde Malley, *not* the plaintiff's attorney.

"These facts do not support a finding of misconduct on the part of Mr. Malley." *Id.*

If an attorney abandoning her client at a critical stage of the proceeding is *not* misconduct, what is it?

Weese v. Schukman, 98 F.3d 542, 552, 553 (10th Cir. 1996) makes a statement concerning fraud upon the court that bears repeating:

> [T]he district court found that Schukman's *counsel* was not guilty of any wrongful or unethical conduct in this regard.

Given the amount of money involved in this action, it was an abuse of discretion on the part of the District Court to refuse to hold a hearing as to *why* Petitioner's counsel refused to appear. Was there a *bribe* involved that should have been investigated? Should the District Court have convened a grand jury to investigate the matter? See F.R.Cr.P. 6(a), *United States v. Christian*, 660 F.2d 892, 900 (3rd Cir. 1981).

That Petitioner's counsel was an "officer of the court," as opposed to a mere plaintiff or defendant, goes without saying. See e.g., *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1131 (9th Cir. 1995).

The deciding panel in the Tenth Circuit Court of Appeals, even *if* they were Article III judges and not merely staff attorneys actually doing the work, ignored a principle of law

that has been with us for over 177 years:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.
>
> *Cohens v. Virginia*, 19 U.S. 257, 290 (6 Wheat. 264, 399-400) (1821).

"[D]ry formalism should not sterilize procedural resources which Congress has made available to the federal courts." *Stutson v. United States*, 116 S.Ct. 600, 603 (1996). Which is what appears to the Petitioner to have happened in the courts below.

II. THE LOWER COURT WAS NOT AUTHORIZED TO DISMISS PETITIONER'S APPEAL AS HAVING BEEN FILED TOO LATE.

The District Court, as the Order of July 2, 1997, Pet. App. 9a, plainly shows, converted Petitioner's allegation of fraud upon the court to "ineffective assistance of counsel."

This is not how Federal Rule of Civil Procedure 60 is supposed to work. Federal Rule of Civil Procedure 60 is remedial and should be *liberally construed*. *Rosier v. Ford*

Motor Co., 573 F.2d 1332, 1346 (5th Cir. 1978). It appeals to the *conscience* of the court. *Petition of Devlas*, 31 F.R.D. 130 (D.C.N.Y. 1962).

III. A LOWER COURT MAY NOT BASE ITS RULING UPON INCOMPLETE RECORDS.

A reviewing court is not supposed to consider an inadequate record. *Marcus v. Otis*, 168 F.2d 649, opinion adhered to 169 F.2d 148 (2nd Cir. 1948).

Worse, concealing of documents is a *felony*. *United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981), certiorari denied, 102 S.Ct. 1031 (1982); *United States v. Bonnano*, 177 F.Supp. 106 (D.C.N.Y. 1959), reversed on other grounds, 285 F.2d 408.

The missing documents obviously did not "walk off" by themselves. At the March 23, 1998 public hearing in Atlanta, Georgia, held by the Commission on Structural Alternatives for the Federal Courts of Appeals, one of the speakers, Peggy Dadic, described similar problems (lawyers or clerks stealing documents from the records) in the Eleventh Circuit Court of Appeals. Mrs. Dadic requested that video cameras be installed in the clerk's office and that the United States Attorney conduct an investigation.

Predictably, her pleas fell on deaf ears.

IV. PETITIONER WAS NOT PROPERLY SUBJECTED TO ARBITRATION.

The District Court correctly held that, "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." Pet. App., 16a. See *AT&T Technologies, Inc. v. Communications Workers of Am.*, 106 S.Ct. 1415, 1418 (1986).

The District Court then made the statement. "Based on the evidence presented. the court finds that ARW's corporate form should be disregarded." Pet. App.. 16a-17a.

There are two problems here.

First. most of the "evidence" is in the missing district court files.

Second. the District Court chose to *rewrite* the *facts.* claiming ARW was "undercapitalized" and that. therefore. this Petitioner was responsible and bound by an arbitration agreement to which he never consented nor agreed. ARW was in fact capitalized with over $4,000,000.00 in cash.

See D'Amato. *The Ultimate Injustice: When the Court Misstates the Facts.* 11 Cardozo L. Rev. 1313 (1989).

The appellate court did not address this issue. Pet. App.. 4a. The issue does seem to generate some confusion. See e.g., *Venable v. Haslip.* 721 F.2d 297. 299 (10th Cir. 1983).

CONCLUSION

For the reasons set forth above. this petition for a writ of certiorari should be granted.

Respectfully submitted.

Spyridon Armenis

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Pro se petitioner

Dated: June 10. 1998

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 97-6280

ARW EXPLORATION CORPORATION,
Plaintiff,

v.

SPYRIDON ARMENIS, also known as Spiro Armenis,
Third Party
Defendant-Appellant,

CESAR V. AGUIRRE; ANASTASIOS ANDRIOPOULOS; CHARLES E. BENDER; B.W. COVINGTON; CHRIS DALAMANGAS; P. DELAPORTAS; GEORGE IOANNIDES; KYRIAKOS IOANNIDES; V. KALTSAS; CHRISTOS P. KARTSONIS; DEMETRIOUS KARTSONIS; A. GEORGE MAGOULIOTIS; A. PAPATHANASOPOLOUS; STEVE POULOS; S.L. PRABHU; INDUMATHI PONNAPALLI, as personal representative of the estate of Ponnapalli Ramakrishna; NEAL ROTH; DOROTHY ROYCHOUDHURY; S.L. STOGIANNIS; G. VALLIANOS,
Defendants-Appellees.

ORDER

Filed March 18, 1998

Before: BALDOCK, EBEL, and MURPHY, Circuit Judges.

Appellant's petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 97-6280

ARW EXPLORATION CORPORATION,
Plaintiff,

v.

SPYRIDON ARMENIS, also known as Spiro Armenis,
Third Party
Defendant-Appellant,

CESAR V. AGUIRRE; ANASTASIOS ANDRIOPOULOS; CHARLES E. BENDER; B.W. COVINGTON; CHRIS DALAMANGAS; P. DELAPORTAS; GEORGE IOANNIDES; KYRIAKOS IOANNIDES; V. KALTSAS; CHRISTOS P. KARTSONIS; DEMETRIOUS KARTSONIS; A. GEORGE MAGOULIOTIS; A. PAPATHANASOPOLOUS; STEVE POULOS; S.L. PRABHU; INDUMATHI PONNAPALLI, as personal representative of the estate of Ponnapalli Ramakrishna ; NEAL ROTH; DOROTHY ROYCHOUDHURY; S.L. STOGIANNIS; G. VALLIANOS,
Defendants-Appellees.

ORDER AND JUDGMENT *

Filed February 19, 1998

Before BALDOCK, EBEL, and MURPHY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Appellant appeals from several district court orders. For the following reasons, this court has jurisdiction to review only the district court's July 2, 1997 denial of appellant's January 27, 1997 motion to set aside the court's order denying appellant's previous motion for reconsideration, and his request for the recusal of two district court judges.

The district court entered final judgment in this action on September 26, 1996. Citing Fed. R. Civ. P. 59 and 60, appellant filed a motion for reconsideration of that decision on October 8, 1996, which, in light of Fed. R. Civ. P. 6(a)'s directions for computing time, was sufficient to toll the time for filing a notice of appeal. *See* Fed. R. App. 4(a)(4). When the district court denied that motion for reconsideration, on December 16, 1996, appellant had thirty days to file his notice of appeal. See Fed. R. App. P. 4(a)(1). He did not do so. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (timely notice of appeal is jurisdictional prerequisite).

Instead, on January 27, 1997, appellant filed motions seeking the recusal of two district court judges and to have the December 16 decision set aside or vacated. As a second post-judgment motion, these pleadings did not toll the time for filing a notice of appeal from the final judgment entered December 16, 1996. *See Okon v. Commissioner*, 26 F.3d 1025, 1026 (10th Cir. 1994); *Mullen v. Household Bank-Fed. Sav. Bank*, 867 F.2d 586, 587 n. 1 (10th Cir. 1989).

Appellant did file a timely notice of appeal from the district court's denial of his January 27, 1997 motions. This court, therefore, has jurisdiction to review only that decision. *See Stubblefield v. Windsor Capital Group*, 74 F.3d 990, 994 (10th Cir. 1996). Upon consideration of the record and the parties' briefs, we affirm.

The district court did not abuse its discretion, *see Cauthon v. Rogers*, 116 F.3d 1334, 1336 (10th Cir. 1997), in denying appellant's motion for the recusal of two district court judges. *See Green v. Branson*, 108 F.3d 1296, 1305 (10th Cir. 1997) (rumors, speculation or opinion concerning judge's impartiality are insufficient; nor are adverse rulings appropriate grounds for disqualifications); *Hutchinson v. Pfeil*, 105 F.3d 562, 565 (10th Cir.) (no abuse of discretion to deny motion to recuse, where district court did not ignore party's arguments, but rather found them to be insufficient), *cert. denied*, 118 S.Ct. 298 (1997).

The district court also did not abuse its discretion, *see Anderson v. Department of Health & Human Servs.*, 907 F.2d 936, 952 (10th Cir. 1990), in denying appellant Fed. R. Civ. P. 60(b)(3) relief from judgment. Appellant's allegations of the incompetence of his attorney are not an appropriate basis for relief. *See MacCuish v. United States*, 844 F.2d 733, 735-36 (10th Cir. 1988). Further, appellant's allegations of fraud are too speculative and conclusory to provide the necessary clear and convincing proof that his attorney was guilty of fraudulent conduct. *See DeVargas v. Montoya*, 796 F.2d 1245, 1258 (10th Cir. 1986), *overruled on other grounds by Newcomb v. Ingle*, 827 F.2d 675, 678 (10th Cir. 1987); *see also Weese v. Schukman*, 98 F.3d 542, 552, 553 (10th Cir. 1996)(requiring clear and convincing evidence of existence of fraud on court that would be actionable above and beyond Rule 60(b)(3), resolving all doubts in favor of finality of previously entered judgment).

The judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Bobby R. Baldock
Circuit Judge

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-90-1598-L and
No. CIV-91-1980-L (CONSOLIDATED)

Honorable Tim Leonard
U. S. District Judge

ARW EXPLORATION CORPORATION,
Plaintiff,

v.

CESAR V. AGUIRRE, et al.,
Defendants/Third Party Plaintiffs,

v.

SPYRIDON (a/k/a "Spiro") ARMENIS,
Third Party Defendant,

and

CESAR V. AGUIRRE, et al.,
Plaintiffs,

v.

ARW EXPLORATION CORPORATION, et al.,
Defendants.

ORDER

Filed July 2, 1997

On September 26, 1996, the court entered Judgment confirming the arbitration award as to Spyridon (a/k/a Spiro) Armenis in his individual capacity and entering judgment in favor of claimants and against Armenis, jointly and severally with the judgment that was entered against ARW Exploration Corporation on December 12, 1993. On December 16, 1996, the court denied Armenis' *pro se* motion to reconsider or for a new trial. This matter is currently before the court on three additional motions presented by Armenis. First, Armenis seeks an order recusing the undersigned and the Honorable Lee R. West pursuant to 28 U.S.C. §§ 144 and 455(a). In addition, Armenis seeks to set aside the court's December 16, 1996 Order denying Armenis' Motion for Reconsideration and/or Motion for New Trial. Finally, Armenis seeks an extension of time in which to file a motion pursuant to Fed. R. Civ. P. 60.

Armenis seeks recusal pursuant to both sections 144 and 455 of Title 28. A prerequisite for recusal under section 144 is a "timely and sufficient affidavit that the judge . . . has a personal bias or prejudice" against the moving party. "Similarly, to obtain disqualification under 28 U.S.C. § 455, a movant must show that a reasonable person, knowing all the circumstances, would harbor doubts about the judge's impartiality, and rumor, speculations, opinions and the like do not suffice." *Green v. Branson*, 108 F.3d 1296, 1305 (10th Cir. 1997)(citation omitted). In this case, Armenis' affidavit is neither timely nor sufficient. Armenis did not seek recusal until after judgment had been entered and his motion for reconsideration was denied. Moreover, Armenis' affidavit contains nothing more than his opinions and speculation regarding the bias of this court based, in large part, on the court's rulings against him. "However, adverse rulings 'cannot in themselves form the appropriate grounds for disqualification.'" *Id.* (*quoting Green v. Dorrell*, 969 F.2d

915, 919 (10th Cir. 1992)). Armenis' Motion to Recuse is therefore DENIED.

Armenis' Motion to Set Aside and Vacate the court's December 16, 1996 Order is DENIED for the reasons expressed in that Order. Whether Armenis' motion to reconsider is considered under Rule 59(e) or Rule 60, it is without merit. Ineffective assistance of counsel is not an appropriate ground for relief under either rule. *See MacCuish v. United States*, 844 F.2d 733, 735-36 (10th Cir. 1988). Armenis' motion for review of documents filed since October 8, 1996 is DENIED as moot, as the court already considered such documents before it issued the December 16, 1996 Order.

Finally, Armenis' motion for extension of time is DENIED as moot. His current motion to vacate was timely under Rule 60 and therefore no extension of time is necessary.

In sum, Armenis' motions (Docket No. 175) are DENIED.

It is so ordered this 2nd day of July, 1997.

/s/ Tim Leonard
TIM LEONARD
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-90-1598-L and
No. CIV-91-1980-L (CONSOLIDATED)

Honorable Tim Leonard
U. S. District Judge

ARW EXPLORATION CORPORATION,
Plaintiff,

v.

CESAR V. AGUIRRE, et al.,
Defendants/Third Party Plaintiffs,

v.

SPYRIDON (a/k/a "Spiro") ARMENIS,
Third Party Defendant,

and

CESAR V. AGUIRRE, et al.,
Plaintiffs,

v.

ARW EXPLORATION CORPORATION, et al.,
Defendants.

JUDGMENT

Filed September 26, 1996

Pursuant to the Orders issued December 10, 1993 and September 25, 1996, the Arbitration Award is confirmed as to Spyridon (a/k/a Spiro) Armenis in his individual capacity and judgment is hereby entered in favor of Cesar V. Aguirre, Anastasios Andriopoulos, Charles E. Bender, B. W. Covington, Chris Dalamangas, P. Delaportas, George Ioannides, Kyriakos Ioannides, V. Kaltsas, Christos P. Kartsonis, Demetrious Kartsonis, A. George Magouliotis, A. Papathanasopoulos, Steve Poulos, S.L. Prabhu, Pannapalli Ramakrishna, Neal Roth, Dorothy Roychoudhury, S. L. Stogiannis, and G. Vallianos ("Claimants") and against Spyridon (a/k/a Spiro) Armenis, jointly and severally with that judgment entered against ARW Exploration Corporation on December 12, 1993, as follows:

Claimant	**Principal and Interest**	**Punitive Damages**	**Total**
Aguirre	$ 25,321	$ 6,330	$ 31,651
Andriopoulos	152,528	38,132	190,660
Bender	662,370	165,593	827,963
Covington	25,321	6,330	31,651
Dalamangas	76,347	19,087	95,434
Delaportas	50,638	12,660	63,298
G. Ioannides	252,837	63,209	316,046
K. Ioannides	467,246	116,812	584,058
Kaltsas	112,725	28,181	140,906
C. Kartsonis	157,532	39,383	196,915
D. Kartsonis	450,597	112,649	563,246
Magouliotis	99,791	24,948	124,739
Papathanasopoulos	139,721	34,930	174,651
Poulos	210,767	52,692	263,459
Prabhu	38,951	9,738	48,689
Ramakrishna	271,838	67,960	339,798
Roth	94,101	23,525	117,626

Roychoudhury	40,901	10,225	51,126
Stogiannis	114,161	28,540	142,701
Vallianos	50,638	12,660	63,298
TOTAL			**$4,524,305**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that ARW Exploration Corporation and Spyridon (a/k/a Spiro) Armenis take nothing on their counterclaims and that claimants have and recover judgment of and from Spyridon (a/k/a Spiro) Armenis, in his individual capacity and jointly and severally with that judgment entered against ARW Exploration Corporation on December 12, 1993, for actual and punitive damages in the amount of $4,524,305.00 together with attorney's fees in the amount of $257,300.00 and administrative fees and expenses in the amount of $7,850.00 for the total sum of $4,789,455.00 and are further awarded post-judgment interest on such amount from and after this date as against Spyridon (a/k/a Spiro) Armenis at the rate of 5.90 percent per annum.

Entered this 26th day of September, 1996.

/s/ Tim Leonard
TIM LEONARD
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-90-1598-L and
No. CIV-91-1980-L (CONSOLIDATED)

Honorable Tim Leonard
U. S. District Judge

ARW EXPLORATION CORPORATION,
Plaintiff,

v.

CESAR V. AGUIRRE, et al.,
Defendants/Third Party Plaintiffs,

v.

SPYRIDON (a/k/a "Spiro") ARMENIS,
Third Party Defendant,

and

CESAR V. AGUIRRE, et al.,
Plaintiffs,

v.

ARW EXPLORATION CORPORATION, et al.,
Defendants.

ORDER

Filed September 25, 1996

The procedural history of this consolidated case is set forth in this court's July 9, 1992 Order and the opinion of the Court of Appeals for the Tenth Circuit in *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1459 (10th Cir. 1995). This matter is before the court on remand from the Court of Appeals for the court to determine whether defendant Spyridon Armenis was subject to arbitration in his individual capacity.

Plaintiffs[1] have moved for summary judgment on this issue. Summary judgment is appropriate if the pleadings, affidavits and depositions "show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed R. Civ. P. 56(c). Any doubt as to the existence of a genuine issue of material fact must be resolved against the party seeking summary judgment. In addition, the inferences drawn from the facts presented must be construed in the light most favorable to the nonmoving party. *Board of Education v. Pico*, 457 U.S. 853, 863 (1982). Nonetheless, a party opposing a motion for summary judgment may not simply allege that there are disputed issues of fact; rather, the party "must set forth *specific* facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e)(emphasis added). *See also, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted). In addition, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion,

1 For ease of reference, the court will refer to the twenty individual investors who purchased interests in one or more of six related oil and gas ventures as "plaintiffs" although they are also named as defendants in Case No. CIV-90-1598.

against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The undisputed facts establish that ARW Exploration Corporation ("ARW") was incorporated under the laws of the State of Oklahoma on May 2, 1985. The day before ARW came into existence, Armenis issued a document entitled "Summary of the Agreement" on ARW letterhead. Armenis signed the document as "President" of ARW. Exhibit 3 to Supplemental Appendix to Plaintiffs' Motion for Summary Judgment [hereinafter cited as Supp. App.]. ARW's corporate franchise was suspended by the Oklahoma Secretary of State on four separate occasions, with the latest suspension occurring on November 18, 1994. Supp. App. Exhibit 11.

Armenis, who was president of ARW from 1985 through at least January 13, 1993, controlled the day-to-day activities of ARW. Armenis personally marketed the joint venture interests to plaintiffs. Affidavit of Kyriakos Ioannides at ¶¶ 6-10, Supp. App. Exhibit 4. When Mr. Ioannides questioned receiving contracts with ARW's name on them, Armenis responded that "the contracts were a technicality which he had to have in case he was inspected, and that he personally guaranteed the money." Id. at ¶ 15. On more than one occasion, when Mr. Ioannides "asked Armenis what this ARW company was, he told me not to worry about it, and that *he was the company*." *Id.* (emphasis added).

Five of the six joint venture agreements between the parties contain the following clause:

> If during the course of the venture the parties are unable to agree on any matter with respect to which a decision must be made, or if on termination no satisfactory arrangement can be made for settlement of each parties

> interest in the venue, the dispute or disputes shall be subject to binding arbitration. Any matter is dispute which is not provided for in this agreement or in the Joint Operating Agreement shall be settled by arbitration, in accordance with the rules of the American Arbitration Association. The arbitration decision will be final and binding upon the parties.

Supp. App. Exhibits 5-9. Armenis signed each of these five joint venture agreements in his capacity as president of ARW. Armenis signed the sixth joint venture agreement, the IFA Joint Venture, in both his individual capacity and as president of ARW. This agreement, however, did not contain an arbitration clause. Supp. App. Exhibit 10.

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *AT&T Technologies, Inc. v. Communication Workers of Am.*, 475 U.S. 643, 648 (1960). As Armenis signed the agreements in his representative capacity, he cannot be subjected to arbitration in his individual capacity unless the corporate identity of ARW is disregarded. *See ARW Exploration Corp.*, 45 F.3d at 1460-61. Plaintiffs present three arguments in favor of the proposition that Armenis was subject to arbitration in his individual capacity. First, plaintiffs assert that Armenis personally and expressly undertook ARW's obligation to arbitrate. Second, plaintiffs claim that Armenis' consent to arbitration should be supplied as a matter of law based on principles of agency and *respondeat superior*. Finally, plaintiffs contend that ARW's corporate existence should be disregarded because Armenis used ARW as a mere instrumentality.

Based on the evidence presented, the court finds that

ARW's corporate form should be disregarded.[2]

> Oklahoma has long recognized the doctrine of disregarding the corporate entity in certain circumstances, and application of the doctrine is not limited to alter ego cases or cases involving fraud but extends to cases "where the facts require the court to disregard separate existence of the corporation and shareholders in order to protect rights of third persons and accomplish justice."

Thomas v. Vertigo, Inc., 900 P.2d 458, 460 (Okla. App. 1995)(citations omitted). The court finds that both equity and the facts of this case require the court to ignore the corporate identity of ARW in order to protect the rights of the investors.

It is undisputed that Armenis used the name "ARW Exploration Corporation" to market the first joint venture before ARW was even incorporated. *Compare* Supp. App. Exhibit 2 *with* Supp. App. Exhibit 3. In addition, Armenis repeatedly told the investors to disregard ARW, that the corporation was mere formality, and that "he was the company." Supp. App. Exhibit 4 at ¶ 15. Furthermore, Armenis pursued litigation on behalf of the corporation during times when the corporation was suspended. *Compare* Supp. App. Exhibit 11 *with* Supp. App. Exhibits 13 and 14. The evidence before the court also supports plaintiffs' assertion that ARW was undercapitalized. As of the date of incorporation, ARW's entire capitalization consisted of $600.00. Yet within a year of incorporation, ARW was committed to manage more than $6,000,000.00 of investor funds. Undercapitalization is one of the factors a court examines to

2 As this finding is dispositive, the court expresses no opinion with respect to plaintiffs' remaining arguments.

determine if a corporation is a mere instrumentality of an individual. *See Home-Stake Production Co. v. Talon Petroleum, C.A.*, 907 F.2d 1012, 1018 (10th Cir. 1990). Armenis has submitted no evidence that the initial capitalization was ever increased. The fact that Armenis was the sole shareholder of ARW coupled with his statements to the investors that the corporation was a mere technicality, Armenis' disregard of the corporate form when it suited his purposes, and the corporation's undercapitalization all counsel in favor of finding Armenis contractually bound to arbitrate.

Plaintiffs' Motion for Summary Judgment (Docket No. 154) is GRANTED. Judgment will issue accordingly.

It is so ordered this 25th day of September, 1996.

/s/ Tim Leonard
TIM LEONARD
United States District Judge